A

## Mohammad Azuwan bin Othman v Public Prosecutor

B

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-42S-15–04 OF 2018
MOHD NAZLAN J
5 SEPTEMBER 2020

C

*Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 395 of the Penal Code — Whether appellant was properly identified — Whether sessions court correct in rejecting alibi — Whether reasonable doubt was cast on the case of the prosecution — Penal Code s 395*

D

The appellant was sentenced to seven years imprisonment and two strokes of whipping. PW1 was on his way home from work, wherein upon arriving at Jalan 3/1A Kepong Indah, PW1 was suddenly detained by three unknown persons, all of whom were identified by PW1 to be of Malay origin. PW1 was thereafter asked by the three men to surrender his belongings to them and take out his money. According to PW1, one of the men held PW1's right hand, another man held his left hand, whilst the third person held him from the back. PW1 also identified the accused as the person who held his right hand. Apart from those three persons, PW1 testified that he also saw the presence of a woman, together with the three men, who however just stood and watched the incident. PW1 complied and took out his wallet from the right pocket and his handphone from the left pocket of his trousers. According to PW1, he surrendered a cash money of RM1,300, to the person who was holding his right hand (whom he later identified as the appellant) and his handphone to the person on his left. PW1 also stated that at the time of the incident, he was very afraid and feared for his safety. All the three men then left the place of the incident and got into a car which was parked beside the highway. The car then left the place towards the direction of Batu Caves. After the incident, PW1 went straight home. He did not immediately make a police report because according to PW1, he did not know how to go about making one and was not sure where the police station nearest to him was. In the same morning however, PW1 told the incident to his friend and employer, by the name of Amax, who advised him to lodge a police report. Accompanied by Amax, PW1 then made a police report at the Kepong Police Station. About two days later, PW1 woke up from his sleep to wash his clothes. When he was about to lay down his clothes for drying, PW1 saw a car which was parked beside the highway and found it to be similar to the one which was driven by his assailants on the night of the incident. Not long after that, PW1 saw three persons getting out of the car and identified them as the same three persons who robbed him a couple of days back. PW1 then called the police. About ten minutes later, two policemen

E

F

G

H

I

arrived at his house. At that time, PW1 saw the three persons were in the car. After gathering some information from PW1, the two policemen went down from PW1's house and made a move to arrest the suspects. PW1 stayed at his house during this time and was not involved in making the said arrest. He also had no knowledge as to how the arrest was effected. After about 20 minutes later, PW1 was contacted by the police, who asked him to come down from his house. PW1 then saw the appellant who was already apprehended by the police. A few days later, PW1 received a call from the police who requested for his presence at the police station for the purpose of witnessing an identification parade. In that process, PW1 identified the accused as one of the assailants on the night of the incident. The appellant called four witnesses to give evidence. The accused also tendered a notice of alibi and listed therein the intended witnesses in support of his alibi. The appellant advanced two primary grounds of appeal being: (a) that the trial judge failed to consider that PW1 had failed to positively identify the appellant as one of those who robbed him; and (b) the trial court failed to properly evaluate the alibi defence of the appellant, and that when he was arrested he was a mere 'bystander'. In addition, it was also asserted by the appellant that the trial court was in error when it ruled that the defence of the accused failed to raise any reasonable doubt against the prosecution case as specified in the charge.

**Held**, dismissing both appeals and affirming the decision of the sessions court:

(1) Although evidence of identification parade was admissible under s 9 of the Evidence Act 1950, there was under the law no legal requirement for an identification parade to be held in order to secure a conviction. In the instant case, PW1 had identified the accused a number of times. First was at the time of the incident, when the accused was tightly holding his right hand and the right side of his body. The accused was also the one to whom PW1 surrendered his RM1,300 cash. Secondly, two days after, PW1 saw the same three men. He called the police and the police on arrival had asked PW1 to again confirm that the three were the same three who robbed him two days prior. Thirdly, immediately after the arrest of the accused the police again asked PW1 to identify if the accused was one of the three who robbed PW1. PW1 testified in the affirmative, stating that he recalled the accused as the one he surrendered his cash to. The testimony of the PW1 on the identity of the perpetrator was consistent, believable and supported by the arresting officer ('PW2'). Prime importance was his ability to make an affirmative identification of the accused as the perpetrator, on the basis of the factual circumstances concerning the incident which the trial court accepted, and from which this court found no reasons to depart (see paras 42, 47–49 & 52).

(2) Any attempt to raise arguments that had previously been considered and which relate to whether or not the prosecution had established all the ingredients of the offence of gang robbery under s 395 of the Penal Code

as charged and whether as a consequence a prima facie case had been proved cannot be further repeated if it was meant to challenge the prima facie finding. However it was open to the accused to repeat the same to the extent that it seeked to cast a reasonable doubt on the prosecution case. On the issue of the identification of the accused, the court of the view that the accused had plainly failed to do so in the absence of any evidence to substantiate his assertion (see para 68).

(3) The testimony of DW4 was indeed generally in consonance with the version offered by the accused. However, on a closer scrutiny of the evidence of the defence witnesses, the court agreed with the findings of the learned trial judge that this version was a fabrication. It was true that the only evidence which puts the accused at the crime scene at the time of the offence was PW1's oral identification. But this was no bar to a conviction if it credibly and adequately formed part of the evidence that established a prima facie case and if the accused failed to raise a reasonable doubt (see paras 89 & 94).

**[Bahasa Malaysia summary**

Perayu telah disabitkan dengan hukuman tujuh tahun penjara dan dua sebatan. SP1 dalam perjalanan pulang dari kerja, setibanya SP1 di Jalan 3/1A Kepong Indah, SP1 telah ditahan oleh tiga orang yang tidak dikenalinya, yang mana SP1 telah dicam sebagai orang berketurunan Melayu. SP1 kemudiannya disoal oleh tiga lelaki tersebut untuk menyerahkan semua barang miliknya kepada mereka dan untuk mengeluarkan wangnya. Menurut SP1, salah satu lelaki tersebut memegang tangan kanan SP1, dan seorang lagi memegang tangan kirinya, manakala lelaki ketiga memegangnnya dari belakang. SP1 mengecam tertuduh sebagai individu yang memegang tangan kananya. Selain daripada tiga individu tersebut, SP1 turut memberikan keterangan bahawa wujud kehadiran seorang wanita dan tiga lelaki lain yang hanya berdiri dan melihat kejadian tersebut. SP1 patuh dan mengeluarkan dompetnya daripada kocek kanan dan telefon bimbit dari kocek kiri seluarnya. Menurut SP1, dia menyerahkan wang tunai sebanyak RM1,300 kepada lelaki yang memegang tangan kananya (yang dicamkan sebagai perayu) dan telefon bimbitnya kepada lelaki di sebelah kirinya. SP1 turut menyatakan pada waktu kejadian, dia berada dalam keadaan takut dan risaukan keselamatannya. Ketiga-tiga lelaki tersebut kemudiannnya meninggalkan tempat kejadian dan telah memasuki sebuah kereta menuju ke arah Batu Caves. Selepas kejadian, SP1 terus pergi ke rumah. Dia tidak membuat laporan polis serta merta kerana dia tidak pasti di mana balai polis terdekat dengannya. Pada pagi yang sama, SP1 memberitahu rakannya dan majikannya mengenai kejadian tersebut bernama Amax, yang menasihatinya untuk membuat laporan polis. Diiringi Amax, SP1 kemudiannya membuat laporan polis di Balai Polis Kepong. Lebih kurang dua hari kemudian. SP1 bangun dari tidur untuk membasuh baju. Apabila beliau hendak menjemur bajunya, SP1 lihat satu kereta yang diletakkan ditepi lebuh

raya dan mendapati bahawa ianya sama dengan kereta yang dipandu oleh individu yang menyerangnya pada malam kejadian. Tidak lama selepas itu, SP1 lihat tiga orang keluar dari kereta tersebut dan mengecam mereka sebagai individu yang sama yang merompaknya beberapa hari lepas. SP1 kemudiannya menelefon polis. Sepuluh minit kemudian, dua anggota polis tiba di rumah tersebut. Pada waktu tersebut SP1 lihat tiga orang tersebut berada di dalam kereta. Selepas mendapatkan maklumat daripada SP1, dua orang anggota polis tersebut turun daripada rumah SP1 dan menahan suspek tersebut. SP1 tinggal di rumahnya pada waktu ini dan tidak terlibat dengan tangkapan tersebut. Dia juga tiada pengetahuan bagaimana tangkapan tersebut dilakukan. Selepas lebih kurang 20 minit, SP1 dihubungi oleh pihak polis yang memintanya untuk turun dari rumahnya. SP1 kemudiannya melihat perayu yang telah ditahan oleh polis. Beberapa hari kemudian, SP1 menerima panggilan telefon daripada pihak polis yang memohon kehadirannya di balai untuk tujuan kawad cam. Dalam proses tersebut, SP1 mengecam perayu sebagai salah seorang individu yang menyerangnya pada malam kejadian. Perayu telah memanggil empat orang saksi untuk memberikan keterangan. Perayu turut memberikan satu notis alibi dan menyenaraikan saksi yang menyokong alibinya. Perayu mengemukakan dua asas rayuan iaitu: (a) hakim bicara gagal untuk menimbangkan bahawa SP1 gagal untuk mengecam perayu sebagai individu yang merompaknya; dan (b) hakim bicara gagal untuk mengamati keterangan pembelaan alibi tertuduh, dan pada masa dia ditahan dia hanya seorang yang berada di tempat kejadian. Tambahan, ianya turut dinyatakan oleh perayu bahawa mahkamah bicara terkhilaf apabila ia memutuskan bahawa pembelaan perayu gagal untuk menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan sepertimana dibutirkan dalam pertuduhan.

**Diputuskan**, menolak kedua-dua rayuan dan mengekalkan keputusan mahkamah sesyen:

(1) Walaupun keterangan kawad cam boleh diterima masuk di bawah s 9 Akta Keterangan 1950, di sisi undang-undang tiada keperluan untuk satu kawad cam di adakan untuk mendapatkan satu sabitan. Dalam kes ini, SP1 telah mengecam tertuduh beberapa kali. Pertama di waktu kejadian, apabila tertuduh memegang tangan kanannya dengan ketat dan bahagian kanan badannya. Tertuduh juga merupakan individu yang SP1 menyerahkan wang tunai RM1,300. Kedua, dua hari kemudian, SP1 melihat tiga lelaki yang sama. Dia telah menelefon polis dan setibanya polis, telah meminta SP1 sekali lagi untuk mengesahkan bahawa tiga individu tersebut adalah orang yang sama yang merompaknya dua hari terdahulu. Ketiga, sejurus selepas tangkapan tertuduh, polis sekali lagi meminta SP1 untuk mengecam jika tertuduh adalah salah seorang individu yang dia serahkan wangnya kepada. Keterangan SP1 berkaitan dengan identiti orang yang melakukan kesalahan adalah konsisten, boleh dipercayai dan disokong pegawai

tangkapan ('SP2'). Perkara yang paling penting adalah keupayaannya untuk membuat pengecaman tertuduh sebagai orang yang melakukan kesalahan, pada asas fakta keadaan berkaitan dengan kejadian yang mana mahkamah bicara telah menerima, dan yang mana mahkamah ini tidak menemui apa-apa sebab untuk beralih daripadanya (lihat perenggan 42, 47–49, & 52).

(2) Apa-apa cubaan untuk menimbulkan hujahan yang telah dipertimbangkan sebelum ini dan yang berkaitan dengan sama ada pendakwaan telah membuktikan semua inti pati kesalahan rompak berkumpulan di bawah s 395 Kanun Keseksaan sepertimana dipertuduhkan dan sama ada sebagai kesan satu kes prima facie telah dibuktikan tidak boleh diulangi sekiranya ianya bertujuan untuk mencabar dapatan prima facie. Namun ianya terbuka untuk tertuduh mengulangi yang sama sejauh mana ianya cuba untuk menimbulkan keraguan munasabah pada kes pendakwaan. Atas isu pengecaman tertuduh, mahkamah mendapati bahawa tertuduh telah gagal untuk berbuat sedemikian dalam ketiadaan keterangan untuk menyokong pengataannya (lihat perenggan 68).

(3) Keterangan SD4 adalah secara amnya selari dengan versi yang dikemukakan oleh tertuduh. Namun, apabila diteliti keterangan saksi pembelaan, mahkamah bersetuju dengan dapatan hakim bicara terpelajar bahawa versi ini merupakan satu rekaan. Adalah benar bahawa satu-satunya keterangan yang meletakkan tertuduh di tempat kejadian di waktu kejadian adalah pengecaman lisan SP1. Namun ianya bukan satu penghalang untuk membuat satu sabitan sekiranya ianya adalah kredible dan mencukupi untuk membuat sebahagian daripada keterangan yang membuktikan kes prima facie dan sekiranya tertuduh gagal untuk menimbulkan keraguan munasabah (lihat perenggan 89 dan 94).]

**Cases referred to**

*Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73, FC (refd)
*Aziz bin Muhamad Din v PP* [1996] 5 MLJ 473, HC (refd)
*Balasingham v PP* [1959] MLJ 193; [1959] 1 LNS 8, HC (refd)
*Jaafar bin Ali v PP* [1998] 4 MLJ 406, HC (refd)
*Kap Hua Tuang v Pendakwa Raya* [2019] MLJU 664; [2019] 5 AMR 61, HC (refd)
*Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457, HC (refd)
*Ku Lip See v PP* [1982] 1 MLJ 194, FC (refd)
*Lim Kim Seng & Anor v PP* [1992] 1 SLR 743, HC (refd)
*Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, SC (refd)
*Mohd Yusri bin Mangsor & Anor v PP and another appeal* [2014] 4 MLJ 875, CA (refd)

*Nagappan a/l Kuppusamy v PP* [1988] 2 MLJ 53; [1988] 1 CLJ Rep 229, SC (refd)
*Ng Nai Lim v Pendakwa Raya* [2011] MLJU 461; [2011] 1 LNS 487, HC (refd)
*Norol Rojik bin Jun v PP* [2018] 6 MLJ 246; [2018] 8 CLJ 186 (refd)
*Nwite Ikechukwu Ogbonnaya lwn Pendakwa Raya* [2018] MLJU 665; [2018] 1 LNS 674, CA (folld)
*Ong Poh Cheng v PP* [1998] 4 MLJ 8, CA (refd)
*Pathmanabhan a/l Nalliannen v PP and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137, FC (refd)
*Pie bin Chin v PP* [1985] 1 MLJ 234; [1983] 1 CLJ 316 (refd)
*Periasamy s/o Sinnappan & Anor v PP* [1996] 2 MLJ 557, CA (folld)
*PP v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (folld)
*PP v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, FC (refd)
*PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
*PP v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143; [2001] 2 CLJ 753, CA (refd)
*PP v Sarjeet Singh & Anor* [1994] 2 MLJ 290, HC (refd)
*PP v Teh Ah Cheng* [1976] 2 MLJ 186 (refd)
*Pendakwa Raya v Fernando Esteban Candia Olcay & Anor* [2019] MLJU 268; [2019] 7 CLJ 96, HC (refd)
*Pendakwa Raya v Joachim Selvanathan and Others* [2009] MLJU 748, HC (refd)
*P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523, CA (refd)
*R v Ipeelee* [2012] SCC 13, SC (folld)
*R v Kenneth John Ball* 25 Criminal Appeal Reports 64 (refd)

**Legislation referred to**

Criminal Procedure Code ss 112, 316, 402A, 402A(2)
Evidence Act 1950 ss 9, 134
Penal Code s 395

*Asmawi bin Ismail (I Asmawi & Co) for the plaintiff.*
*Nur Asyikin bt Mokhtar (Deputy Public Prosecutor, Attorney General's Chambers) for the defendant.*

**Mohd Nazlan J:**

INTRODUCTION

**[1]** This is an appeal against the conviction recorded and sentence meted out by the sessions court against the accused for an offence of gang-robbery under s 395 of the Penal Code where the accused was sentenced to seven years' imprisonment from the date of the sentence and two strokes of whipping. The

prosecution also filed a cross-appeal against the sentence. In this judgment the parties are referred to as they were at the trial court.

**[2]** At the conclusion of the hearing of the appeal, I delivered my decision to dismiss the appeal and the cross-appeal, and highlighted the principal grounds for the same. This judgment contains the full reasons for my decision.

## KEY BACKGROUND FACTS

### *The charge*

**[3]** The prosecution had preferred the following one charge under s 395 of the Penal Code against the accused:

> Bahawa kamu bersama-sama tiga lagi yang masih bebas pada 5.9.2016 jam lebih kurang 1 pagi bertempat di Jalan 3/1A Taman Kepong Indah, di dalam daerah Sentul, dalam Wilayah Persekutuan bandaraya Kuala Lumpur, telah melakukan rompakan berkumpulan terhadap Hendra Siau, No Pasport B0529xxx dengan merompak wang tunai sebanyak RM1300 dan telefon bimbit jenama Samsung Note 3. Oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 395 Kanun Keseksaan.

### *The salient facts of the prosecution case*

**[4]** According to the case of the prosecution, on 5 September 2016, at about 1.05am, the complainant ('PW1') finished his work for the day and left his work place, which is known as the Popo Restaurant (which is situated at Kepong Indah) to go home. At about 1.30am, on his way back to his house and upon arriving at Jalan 3/1A Kepong Indah, PW1 was suddenly detained by three unknown persons, all of whom were identified by PW1 to be of Malay origin.

**[5]** PW1 was thereafter asked by the three men to surrender his belongings to them and take out his money. According to PW1, one of the men held PW1's right hand, another man held his left hand, whilst the third person held him from the back. PW1 also identified the accused as the person who held his right hand. Apart from those three persons, PW1 testified that he also saw the presence of a woman, together with the three men, who however just stood and watched the incident.

**[6]** PW1 complied, and took out his wallet from the right pocket and his Samsung Note 3 handphone from the left pocket of his trousers. According to PW1, he surrendered a cash money of RM1,300 being his monthly salary earlier given by his employer, to the person who was holding his right hand (whom he later identified as the accused) and his handphone to the person on

his left. PW1 also stated that at the time of the incident, he was very afraid and feared for his safety. All the three men then left the place of the incident and got into a car which was parked beside the highway. The car then left the place towards the direction of Batu Caves.

**[7]** After the incident, PW1 went straight home. He did not immediately make a police report because according to PW1, he did not know how to go about making one and was not sure where the police station nearest to him was. In the same morning however, PW1 told the incident to his friend and employer, by the name of Amax, who advised him to lodge a police report. Accompanied by Amax, PW1 then made a police report (P1) at 8pm at the Kepong Police Station.

**[8]** About two days later, early on 7 September 2016, at around 4am, PW1 woke up from his sleep to wash his clothes. When he was about to lay down his clothes for drying, PW1 saw a car which was parked beside the highway and found it to be similar to the one which was driven by his assailants on the night of the incident. PW1 was not sure of the distance between his house unit and the place where the car was parked but described the distance to be further than the court's door from the witness dock. Not long after that, PW1 saw three persons getting out of the car and identified them as the same three persons who robbed him a couple of days back. PW1 then called the police. About ten minutes later, two policemen arrived at his house. At that time, PW1 saw the three persons were in the car.

**[9]** After gathering some information from PW1, the two policemen went down from PW1's house and made a move to arrest the suspects. PW1 stayed at his house during this time and was not involved in making the said arrest. He also had no knowledge as to how the arrest was effected. After about 20 minutes later, PW1 was contacted by the police, who asked him to come down from his house. PW1 then saw a man (the accused) who was already apprehended by the police.

**[10]** A few days later, PW1 received a call from the police who requested for his presence at the police station for the purpose of witnessing an identification parade. In that process, PW1 identified the accused as one of the assailants on the night of the incident.

**[11]** The accused was subsequently charged for the offence of gang robbery, as specified in the charge under s 395 of the Penal Code referred to earlier.

*Decision of trial court at the end of prosecution case*

**[12]** It is to be observed that the sessions court had on 21 February 2017 initially found that the prosecution failed to establish a prima facie case against the accused and had acquitted the accused at the end of the prosecution case. According to the grounds of judgment of the learned trial judge in the appeal record, the reasons were briefly stated to be related to a failure of the identification of the accused as the perpetrator by the complainant ('PW1') and lack of a comprehensive investigation by the police.

**[13]** On an appeal however, the High Court on 6 October 2017 reversed the findings of the sessions court and ordered that the accused be called to enter his defence.

THE ESSENCE OF THE DEFENCE

**[14]** The accused called four witnesses to give evidence. It is observed from the record of appeal that the accused also tendered a notice of alibi and listed therein the intended witnesses in support of his alibi. The accused himself in his testimony stated that on 4 September 2016, one day before the incident date, at about 1.30pm he left his home in Batang Berjuntai, Selangor and went to his cousin's house at Prima Saujana Invory Residence Condominium, Kajang. The accused said he was at his cousin's residence until 11pm after which he went to Bandar Baru Bangi Uptown and subsequently returned to his house in Batang Berjuntai, Selangor.

**[15]** The accused claimed that upon arriving home at around 2.45am on 5 September 2016, he immediately went to bed, and slept until about 3.30pm same day. The accused testified that in the afternoon of the same day, he spent his time loitering around within the confines of his home and went nowhere.

**[16]** The accused testified that he only went out the day after, on 6 September 2016 at around 6.30pm He drove his father's Proton Wira Aero-back to the house of his friend, Muhammad Syaqir bin Mazli ('DW4') who then lived Bestari Jaya in Kuala Selangor. Both of them then went to Puncak Alam and thereafter to a hospital in the proximity of Jalan Pudu. At 9pm, the accused and DW4 went to Ampang Point and were there until 11.30pm. Between 11.30pm until 1.30am on 7 September 2016, they spent their time at Jalan Doraisamy, Kuala Lumpur.

**[17]** The accused further testified that at around 2am on 7 September 2016, he and DW4 went to an entertainment outlet — Borneo Entertainment Centre — at Jalan Setapak in Taman Seri Rampai and met a girl by the name of Ana. Together with Ana, they subsequently left the premise and drove towards Sungai Buloh-Damansara and they spent time at Kota Damansara

A until about 3.30am, DW4 then informed the accused that he needed to send Ana back to the entertainment premise at Taman Seri Rampai and asked for the accused's permission to use his car.

B **[18]** On their way to Taman Seri Rampai, the accused who claimed to be very hungry then asked DW4 to stop the car at around 4am for the accused to get off at the road side near a Petronas petrol station near Taman Layang-Layang, Kepong. The accused then walked towards a row of shop lots area to find a *mamak* restaurant and was planning to wait for the return of DW4 there.

C

**[19]** The version of the accused is that while walking at the area, the accused was shocked when he saw that there were police in pursuit of a few persons. He managed to ask one policeman what was going on and was told there was a

D robbery but soon after suddenly however, another policeman apprehended the accused and handcuffed him. He was accused of being involved in a robbery. He was then led to a Perodua Viva before being brought to the police station.

THE DECISION OF TRIAL COURT

E

**[20]** At the conclusion of the trial, the sessions court found the accused guilty of the charge, who was thereafter convicted, and sentenced the accused to seven years' imprisonment and two strokes of whipping.

F **[21]** In finding that the defence of the accused had failed to raise any reasonable doubt on the prosecution's case and that the prosecution had succeeded in proving the charge against the accused beyond reasonable doubt, the sessions court judge held among others, the following. First the accused did not call his cousin, one Faris Irfan to testify in order to substantiate his defence

G with regard to his alibi on his presence at his cousin's house in Kajang. In fact there was even no explanation as to the non-calling.

**[22]** Secondly, the testimony of the accused's mother ('DW2') was inconsistent to that of the accused, especially concerning the presence and

H movements of the accused on the day of the commission of the crime. In fact, DW2 herself was not listed as one of the witnesses in the accused's notice of alibi and that her evidence in court was therefore more of an afterthought.

I **[23]** Thirdly, the testimony of Muhammad Syaqir ('DW4') pertaining to his movements with the accused from the afternoon of 6 September 2016 until the morning of 7 September 2016 was held to be fictitious. It was also contrary to the missing person report (on the accused) lodged by the accused's father ('DW3') with the police on 14 September 2016 ('D9'). The content of the police report showed that Syaqir was contacted by the accused's father

enquiring of the whereabouts of the accused to which Syaqir replied that he had no knowledge of nor had he met the accused.

**[24]** In sentencing the accused, the sessions court judge in his grounds of judgment stated that he had taken into account the gravity of the offence, public interest considerations and the principles of sentencing when imposing the punishment of seven years' imprisonment and two strokes of whipping.

PRINCIPAL GROUNDS OF APPEAL

**[25]** The accused subsequently exercised his right to appeal against the decision of the trial court, and set out in the petition of appeal a number of grounds of appeal against the decision of the sessions court. For the purpose of this appeal these grounds could be grouped into two key contentions, as identified by the learned counsel for the accused in his written submissions. The cross-appeal by the prosecution is predicated on the argument that the sentence meted out by the sessions court to have been manifestly inadequate.

**[26]** The accused advanced two primary grounds of appeal against the decision of the sessions court. First, it is argued that the trial judge failed to consider that the identification of the accused by the complainant ('PW1') was disputed, and that PW1 himself failed to identify the accused. Further, the identification parade process too was defective.

**[27]** Secondly, the accused submitted that the trial court failed to properly evaluate the alibi defence of the accused, and that when he was arrested he was a mere 'bystander'. In addition, it was also asserted by the accused that the trial court was in error when it ruled that the defence of the accused failed to raise any reasonable doubt against the prosecution case as specified in the charge.

**[28]** The prosecution on the other hand, in its resistance to this appeal, argued that these contentions of the accused are without merit.

LAW ON APPELLATE INTERVENTION

**[29]** In hearing this criminal appeal, I am mindful of the duty of this court as established by the governing statute and the applicable case law authorities and have therefore proceeded approaching the same accordingly.

**[30]** Section 316 provides for the duty of a court hearing an appeal from a subordinate court in the following terms:

316 Decision on appeal

At the hearing of the appeal the Judge may, if he considers there is no sufficient

ground for interfering, dismiss the appeal, or may:

(a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction or in an appeal as to sentence:

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order.

**[31]** In the often quoted authority of the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA (as he then was) instructively made the following observation:

In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.

In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefore an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):

... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred *the High Court should and will always give proper weight and consideration to such matters as:*

(1) *the views of the trial judge on the credibility of the witnesses;*

(2) *the presumption of innocence in favour of the accused;*

(3) *the right of the accused to the benefit of any doubt; and*

(4) *the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.*

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955]

AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt(or Thomas) v Thomas* [1947] 1 All ER 582 that:

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.*

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so. (Emphasis added.)

In *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that *in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end*; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> ...
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

**[32]** The principles governing appellate intervention have also been analysed and explained by the Court of Appeal in *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523, where Mohd Zawawi Salleh JCA (as he then was) held:

> [13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is de novo review where the appellate court is not required to give deference to the rulings of the trial judge. Rather, it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163); *Zaharah Bt A Kadir (acting as the Authorised Representative of Abdul Kadir Bin Ami, Deceased) v Ramunia Bauxite Pte Ltd & Anor* [2011] MLJU 922; [2011] 1 LNS 1015, *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1). The findings of fact of the trial judge can only be reversed when

it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some mater which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or

(c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

(d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[14] What, then, is the appropriate standard of review for the appellate court to apply in mixed question of fact and law? In our view, the appropriate standard of review in this situation would be to give appropriate deference to the trial judge's factual finding but to reserve for the appellate court the ability to independently evaluate the legal effect of those factual finding.

**[33]** And the position concerning situations where appellate interference is warranted is further reiterated in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875, where Mohd Zawawi Salleh JCA (as he then was) stated thus:

[4] We have heard learned counsel for the appellants and learned deputy public prosecutor ('DPP') at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

**[34]** With the above principles in mind, I now deal with the points of appeal raised by the accused.

EVALUATION AND FINDINGS OF THIS COURT

*First issue — Identification of the accused by PW1*

**[35]** The essence of the complaint of the accused on this ground is that the trial judge failed to consider that the evidence of the victim ('PW1') did not establish that he had positively identified the accused as one of those who robbed him in the early hours of 5 September 2016 as specified in the charge.

**[36]** The basis of this assertion is that according to the testimony of the victim ('PW1'), he could not provide a description of the physical attributes of the perpetrator other than stating the latter was taller than him. But when examined in court a comparison of the height of the accused and that of PW1 reveals only an insignificant difference of the accused being about 1 to 2cm taller only. This is not to mention, according to the accused, that the incident occurred at 1am in the morning as stated in the charge.

**[37]** The accused submitted, furthermore, that PW1 only made a positive identification in court when the accused was already in the dock.

**[38]** In addition, the identification parade was flawed and of no value because the report in ID6 had no relevance to the accused. Neither did the prosecution establish any link whatsoever with the Perodua Viva which was recovered by the police and from which PW1 said, the accused alighted.

**[39]** Based on my evaluation of the appeal record, I find these contentions of the accused to be unsustainable. I say so because of two principal reasons.

**[40]** The first is evidentiary in nature. I accept that the identification parade report should remain as ID6 and not converted into an exhibit because the police officer who conducted the process, one Inspector M Hafiz Majid was not

called by the prosecution. The investigating officer himself, Sarjan Ahmad Sharul Hazri bin Suharto ('PW5') was not present at the parade. Further the report itself ('ID6') is not easily comprehended. Nine names were listed none of which was the accused's.

**[41]** In cases such as *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143; [2001] 2 CLJ 753 the Court of Appeal ruled that it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person. It is true that no such evidence is forthcoming in this case vis a vis the identification parade report.

**[42]** It should nevertheless be reiterated that although evidence of identification parade is admissible under s 9 of the Evidence Act 1950, there is under the law no legal requirement for an identification parade to be held in order to secure a conviction. Thus Abdul Malik Ishak JC (as he then was) in *Public Prosecutor v Sarjeet Singh & Anor* [1994] 2 MLJ 290 said:

> In my judgment, the necessity of holding an identification parade can only arise where the accused persons are not previously known to the witnesses (see *Mehtab Singh & Ors v State of Madhya Pradesh*). It follows, therefore, that where the accused persons are already known to the witnesses, the question of identification parade does not arise. Here, there was no evidence that the taxi driver knew the trio prior to the robbery. Therefore, the police should have conducted an identification parade and the failure to organize one gives rise to the lurking suspicion that if conducted, the taxi driver could not identify the trio. Non-holding of the test identification parade, though it may not be a ground to vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification (see *Lajja Ram v State* and *Awadh Singh v State*).

**[43]** Chong Siew Fai CJ (Sabah and Sarawak) in speaking for the Federal Court in *Arumugam s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73 said:

> Generally speaking, however, a dock identification in the sense as described above, ie identification of an accused for the first time in court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade cannot or need not be held, for example, the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

**[44]** And further clarification was found in the judgment of Augustine Paul J (as he then was) in *Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406 where it was stated in the following terms:

> On the instances when an identification parade is required, Andrews & Hirst say

this at p 321:

> It is necessary to distinguish between cases in which the accuracy of a purported identification is in issue, and cases in which the only issue is whether identifying witnesses are lying. In the former kind of case, much will turn upon the reliability or pre-trial identification, and a failure to follow proper procedures in respect of such identification may well lead to the court or judge excluding the evidence concerning it. It will also be essential, in most cases, for the judge to direct the jury on the dangers of mistaken identification, in accordance with the procedures prescribed by the Court of Appeal in *R v Turnbull* [1976] 3 All ER 549.
>
> Where, in contrast, the veracity of the witness is the only issue, it will not generally be either necessary or appropriate for the identification parade to be held or for a *Turnbull* direction to be given.

Thus, in *R v Courtnell* [1990] Crim LR 115 (distd), the appellant was identified by a publican as the man who had robbed him of his takings. There was no identification parade; at a confrontation the publican claimed to recognize him as a regular customer over the previous week; the appellant alleged in reply that he was being 'stitched up', and subsequently ran a defence alleging that the case against him was a total fabrication. He was convicted, and appealed on the ground that no *Turnbull* direction had been given at the trial but the Court of Appeal held that none was required. In *R v Cape* [1996] 1 Cr App Rep 191 (distd), it was held that in a case where the witness knew the accused well and the latter's sole defence was one of malicious fabrication by the witness no useful purpose could have been served by the giving of a Turnbull warning. When the accused is caught red-handed, there is no need for an identification parade (see *Ho Yew Cheng v R* [1962] MLJ 437 (distd)). The evidence of identification parade is admissible under s 9 of the Evidence Act 1950 (see *ST Shinde v State of Maharashtra* AIR 1974 SC 791 (refd)).

**[45]** For comparison I refer to another case where dock identification was however held to be unreliable. The High Court in *Pendakwa Raya v Joachim Selvanathan and Others* [2009] MLJU 748 considered various factors in arriving at the conclusion that the dock identification was weak. It was held thus:

> In short the circumstances surrounding the identification by SP14 are as follows: (a) the incident happened at night; (b) SP14 observed the assailants in the heat of the moment before he ran away; (c) SP14 was in a state of shock; (d) SP14 may have been in a state of intoxication; (e) the 3 accused persons are not known to SP14 previously; (f) there was no light at the food stall and it was dark; (g) no description of the accused person's appearances were given by SP14 to the police; (h) there is no special reason for SP14 to remember the accused persons; and (i) the time elapse of four years between the original sighting and the dock identification. For the foregoing reasons the court finds that SP14's identification evidence is weak and unreliable.

**[46]** Even a cursory read of these factors would readily alert the reader that the key deficiency in that case revolves around the fact that the incident happened at night, the food stall had no light and was dark, and that the witness, who may have been intoxicated, observed the assailants only briefly at the heat of the moment before he ran away. These factual matrix is poles apart from the facts in the instant case before me.

**[47]** In the instant case before me, the complainant ('PW1') had identified the accused a number of times. First was at the time of the incident, when the accused was tightly holding his right hand and the right side of his body. The accused was also the one to whom PW1 surrendered his RM1,300 cash. The entire period the complainant was accosted by the three, according to PW1, took about ten minutes.

**[48]** Secondly, two days after, on 7 September 2016, PW1 saw the same three men. He called the police and the police on arrival had asked PW1 to again confirm that the three were the same three who robbed him two days prior. This is confirmed by the testimony of the arresting officer, L/Corp Md Kamal bin Alias ('PW2'). PW2 also testified that the police arresting team spent about 30 minutes, upon arrival at the scene, obtaining the confirmation from the accused and making observation on the suspects and setting the ambush before effecting the raid and arresting the accused. The other two managed to escape.

**[49]** Thirdly, immediately after the arrest of the accused the police again asked PW1 to identify if the accused was one of the three who robbed PW1. PW1 testified in the affirmative, stating that he recalled the accused as the one he surrendered his cash to.

**[50]** And even if the identification of the accused by PW1 at the identification parade as testified by PW1 and the investigating officer ('PW5') is disregarded, PW1 again positively identified the accused in court. It hardly needs emphasising that it is a settled principle of law that despite the absence or rejection of the evidence of the identification of an accused during an identification parade, the court nevertheless can take into account the dock identification of the accused (see *Ong Poh Cheng v Public Prosecutor* [1998] 4 MLJ 8).

**[51]** Overwhelmingly therefore, the evidence point to the guilt of the accused, as charged. Further it has been said that various people are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly different versions (see *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234; [1983] 1 CLJ 316). The discrepancy, if it could be said to be one, is patently

minor that should not warrant non-acceptance of the testimony of any of the said prosecution witnesses. A

**[52]** The testimony of the victim ('PW1') himself on the identity of the perpetrator is consistent, believable and supported by the arresting officer ('PW2'). Of prime importance is his ability to make an affirmative identification of the accused as the perpetrator, on the basis of the factual circumstances concerning the incident which the trial court accepted, and from which this court finds no reasons to depart. B

C

**[53]** Although PW1 was not able to recall or describe the physical attributes of the accused other than stating he was quite slim and taller than him, PW1's explanation that he was not able to make focused observations as he was fearful of the men at the time of the incident is understandable. His ability to identify the accused primarily by facial recognition is also unsurprising as the accused literally had bodily contact with PW1. The accused was standing close to the right side of PW1 and that it was the accused whom PW1 surrendered his cash to. D

**[54]** As stated PW1 had a good look at the accused on three occasions — once on 5 September 2016 and twice on 7 September 2016, and none of the three involves a time span that was merely fleeting. There was also no real issue about the lighting at the place at the material time given it being in the vicinity of shop houses. There was no question of any impediment to PW1 recognising the accused on the first, second and third occasions. And not only did PW1 have sufficient time to observe the accused to be able to identify him positively. PW1 also in addition identified the accused by way of dock identification, even if the identification in the ID parade is disregarded. In *Kap Hua Tuang v Pendakwa Raya* [2019] MLJU 664; [2019] 5 AMR 61, the witness was able to identify the accused as he had a look at the latter and encountered him not merely once for a split second, but on a good four different occasions over a span of several minutes. E F G

**[55]** Accordingly, I find the ground of appeal that the trial judge failed to appreciate the alleged contradiction in evidence of the witnesses on the identity of the perpetrator to be without merit. H

**[56]** The second primary reason why this contention of the accused cannot succeed, which is also applicable to the accused's arguments that there is no evidence linking the accused to the Perodua Viva or that there is a material gap in the prosecution case as the police did not perform a thorough investigation, is this. I

**[57]** As stated earlier, the High Court had previously overturned the trial court's decision to acquit the accused at the end of the prosecution case and instead called for the defence of the accused. This means that at the end of the trial, the trial judge is already bound by the decision on the finding of prima facie by the High Court. The trial court needed only to focus on the defence evidence to ascertain whether it is able to explain or rebut the prosecution case. In the sense whether the accused could raise a reasonable doubt on the case of the prosecution. It is not open for the trial court to revisit the question of whether prima facie case was correctly established against the accused.

**[58]** This also means that the issue of identification has already been established at the end of the prosecution case since it is integral to the charge vis a vis the element of the offence of gang robbery under s 395 of the Penal Code. The submissions on the issue of identification by the defence before me had all been raised at the prosecution stage by the defence, and the evidence of the defence witnesses did not add anything of substantive worth that could reasonably doubt the prosecution case on this specific matter of identification of the accused.

**[59]** It is worthy of emphasis that in such a situation, when the matter reverts to the sessions court, the proceeding resumes with the defence case, because the lower court is bound by the decision of the High Court which finds a prima facie case against the accused.

**[60]** This is a fundamental point in criminal procedural law. And that is the settled position under the law as enunciated by the appellate courts which are also plainly binding on the High Court and the subordinate courts under the stare decisis principle. This very issue was addressed by the Court of Appeal in the case of *Nwite Ikechukwu Ogbonnaya lwn Pendakwa Raya* [2018] MLJU 665; [2018] 1 LNS 674.

**[61]** I can do no better than reproducing the relevant passages from the judgment of Mohd Zawawi Salleh JCA (as he then was), who instructively held as follows:

> [14] Pada pandangan kami, pendekatan yang diambil oleh hakim bicara adalah betul di sisi undang-undang. Adalah menjadi undang-undang mantap bahawa apabila Mahkamah Rayuan telah mengakaskan keputusan hakim bicara dan memerintahkan agar perayu dipanggil membela diri terhadap pertuduhan yang dikemukakan terhadapnya, tugas hakim bicara ialah untuk memutuskan sama ada pembelaan perayu telah berjaya menimbulkan keraguan yang munasabah terhadap kes pendakwaan, dan jika apa-apa anggapan statutory telah digunapakai, sama ada anggapan tersebut telah dipatahkan atas imbangan kebarangkalian.

[15] Hakim bicara adalah tidak dikehendaki untuk mengulangkaji keputusan yang dibuat oleh Mahkamah Rayuan bagi menentukan sama ada satu kes prima facie telah berjaya dibuktikan oleh pihak pendakwaan. Pendekatan ini telah dinyatakan, antara lain, oleh kes *Public Prosecutor v Sanin bin Othman* [2011] 5 MLJ 716; [2011] 1 CLJ 626, apabila mahkamah ini menyatakan:

> When defence is directed to be called by an appeal court the trial judge must accept that a prima facie case has been proven. It is as if the defence was called by the learned judge himself *(Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; [1998] 4 CLJ 575). Only after he has gauged the total evidence adduced, inclusive of all the evidence adduced at the prosecution's stage, and tested as against the defence evidence may the fate of the accused person be decided by the court. In short there will be a maximum evaluation of the whole evidence at the close of the defence.

**[62]** As such, in this case, the trial court must accept the decision of the High Court which found a prima facie case. It is not open for the trial court to revisit the issue of whether prima facie case has been established, even though the trial court had previously found it was not established on a maximum evaluation of the evidence adduced during the prosecution case.

**[63]** This is because the High Court has set aside and reversed the acquittal and instead determined that a prima facie case has been proved and ordered the accused to enter his defence. The duty of the trial court in that situation is to ascertain whether the prosecution has at the end of the entire case proven its case beyond reasonable doubt, which is dependent on whether the accused, who bears the evidential burden, has succeeded in raising a reasonable doubt in the case of the prosecution (for which prima facie has been proved) or any applicable statutory presumption rebutted on a balance of probabilities.

**[64]** This was also made crystal clear in another relatively recent decision of the Court of Appeal which also had to deal with the same point. The position was reiterated by Abdul Rahman Sebli JCA (as he then was) in *Norol Rojik bin Jun v Public Prosecutor* [2018] 6 MLJ 246; [2018] 8 CLJ 186 in the following terms:

[10] The appellant's first ground of appeal against conviction was as follows:

> The learned High Court judge should not have called the defence on the charge of murder as it was obvious that the most important ingredient of murder, ie, mens rea was absent. There was absolutely no evidence at all that the appellant intended to murder anyone particularly the deceased.

[11] We found no merit in this ground of appeal. First of all, the calling of the appellant's defence to the original murder charge was on the order of this court, which must be taken as if it was made by the trial judge himself. It was therefore not

A open to the succeeding judge to reopen the issue of whether a prima facie case had been established by the prosecution. Nor was it open to us, being a court of co-ordinate jurisdiction, to do so.

[12] The trial judge's duty after the order was made by this court was only to consider whether the appellant's explanation, if any, had cast a reasonable doubt in
B the prosecution case. But of course in doing so, the learned judge was bound by s 182A(1) of the Criminal Procedure Code ('the CPC') to consider all the evidence adduced before the court, which necessarily includes evidence adduced by the prosecution at its stage of the case.

C **[65]** In the instant case before me however the learned trial judge, from the grounds of judgment, had not undertaken a re-evaluation of whether a prima facie case had been proved against the accused even though the High Court had reversed the finding of the same sessions court. The one and only question to be
D determined by a trial court at the end of the trial is whether the defence has raised a reasonable doubt as to the truth of the prosecution case or as to the guilt of the accused. And for this purpose the trial court must judicially consider the defence in the light of the prosecution case and pronounce its decision on the totality of the evidence before it (see the Federal Court decision in *Public*
E *Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276).

**[66]** It is also inevitable that in performing this judicial process at the end of trial the evidence elicited at the prosecution stage (which had led to a prima facie case) must also be evaluated, albeit in a context of an entire case. In this
F case there is no evidence concerning the identification of the accused proffered by the witnesses for the accused, including the accused's own testimony which raises anything which had not already been submitted at the end of the prosecution case.

G **[67]** I think it would not be remiss of me to repeat that the overarching primary burden on the prosecution to prove its case beyond reasonable doubt continues to hold true throughout the trial, whereby at the close of the whole case the court has to consider all the evidence adduced by both the prosecution
H and the defence and has to be satisfied that the case has been proven beyond reasonable doubt (see the Supreme Court decision in *Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53; [1988] 1 CLJ Rep 229), such that any findings by the trial judge consequent upon the examination of the evidence adduced and the arguments posited by the defence which are intended to cast
I a reasonable doubt against the case of the prosecution or to rebut on a balance of probabilities any statutory presumption against the accused cannot in any event change the determination of prima facie case earlier pronounced against the accused.

**[68]** As such any attempt to raise arguments that had previously been considered and which relate to whether or not the prosecution had established all the ingredients of the offence of gang robbery under s 395 of the Penal Code as charged and whether as a consequence a prima facie case has been proved cannot be further repeated if it is meant to challenge the prima facie finding. However it is open to the accused to repeat the same to the extent that it seeks to cast a reasonable doubt on the prosecution case. In the instant case, on the issue of the identification of the accused, I am of the view that the accused has plainly failed to do so in the absence of any evidence to substantiate his assertion. For the same reason, the other arguments of the accused including that there was no evidence linking him to the Perodua Viva or that the police did not perform a complete investigation which resulted in a gap in the prosecution case must similarly fail.

**[69]** Further, I agree with the contention of the prosecution that the absence of finger prints or even DNA evidence such as linking the accused to the Perodua Viva is not fatal to the case of the prosecution. They are usually merely providing support to the case of the prosecution. Their importance is dependent of the circumstances of each case.

**[70]** It is also settled that under s 134 of the Evidence Act 1950 no particular number of witness is required to prove any fact. The testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457). The overarching principle is that evidence has to be weighed and not counted (see *Aziz bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473. I rule that there is similarly no merit in this ground of appeal.

*Second issue — The defence of alibi*

**[71]** The one other key issue raised by the accused is that the trial judge failed to appreciate the alibi defence put forward by the accused, and that when he was later arrested he was a mere 'bystander'. With this alibi notice, the accused intends to support his version of what had transpired on the relevant date of 5 September 2016 which is stated in the charge against him as to when the crime was committed.

**[72]** It will be recalled, as I have set out above, that in the testimony of the accused himself, the accused gave evidence that on 4 September 2016, one day before the incident date, at about 1.30pm he left his home in Batang Berjuntai, Selangor and went to his cousin's house at Prima Saujana Invory Residence Condominium, Kajang. The accused said he was at his cousin's residence until 11pm after which he went to Bandar Baru Bangi Uptown and subsequently returned to his house in Batang Berjuntai, Selangor.

**[73]** The accused claimed that upon arriving home at around 2.45am on 5 September 2016, he immediately went to bed, and slept until about 3.30pm same day. The accused testified that in the afternoon of the same day, he spent his time loitering around within the confines of his home and went nowhere. The accused testified that he only went out the day after, on 6 September 2016 at around 6.30pm.

**[74]** There are however a number of problems with this alibi defence.

**[75]** Before that, it should be stated that the alibi notice was dated 13 October 2017. This was after, as stated earlier, the High Court on 6 October 2017 reversed the decision of the sessions court to acquit the accused and instead ordered that he be called to enter his defence. The provisions on alibi are contained in s 402A of the CPC which read as follows:

> 402A Alibi
>
> (1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi.
>
> (2) Where the accused seeks to put forward a defence of alibi, he shall put forward a notice of his alibi during the case management process.
>
> (3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at any time during the trial subject to the following conditions:
>
> (a) the accused has given a written notice of the alibi to the Public Prosecutor; and
>
> (b) the Public Prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.
>
> (4) The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

**[76]** Under present law however, if the accused did not give the alibi notice during the case management stage under s 402A(2), he could still lead evidence relating to the defence of alibi during trial, and notice must still be given to the prosecution. This was what done by the accused.

**[77]** Abdul Hamid FJ (later LP) in *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194 explained the concept in the following terms:

> A determination whether particular evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the

presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that: 'What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing' (see *Criminal Law Review*1978 pp 277–278 and also on p 278 where it is further stated that 'a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged).

**[78]** The alibi notice of the accused states that on the day of the robbery on 5 September 2016 and at around 1.30am the accused was at home at Batang Berjuntai the whole day and did not go out. The notice also states that just prior to his arrest, the accused was with his friend Muhammad Shaqir ('DW4') who dropped him off in the area where he was then arrested. The accused in his alibi notice referred to two individuals. His father ('DW3') and his friend Muhammad Shaqir ('DW4'). Both were called as witnesses.

**[79]** The critical question therefore is whether the defence had managed to lead evidence to show that the accused was *not* at the crime scene on the date and at the time as stated in the charge — at about 1am on 5 September 2016.

**[80]** Now, despite naming only two — DW3 and DW4 in the alibi notice, the defence in fact called the accused's mother, Nurulhuda bt Musa ('DW2') in the attempt to support the alibi defence of the accused. In her short testimony, DW2 said when giving evidence in chief that the accused was at home the whole of 5 September 2016. But when cross examined, DW2 denied that the accused came home on 5 September 2016 at 2.30am. Even though this may be consistent with the alibi notice, it flatly contradicts the accused's own testimony, which is also the same as stated in his s 112 of the CPC cautioned statement ('D7') that, as stated earlier, he went out at noon on 4 September 2016 and arrived home at 2.45am on 5 September 2016.

**[81]** As such the learned trial judge was correct in his assessment that DW2's evidence was contrary to the version of the accused himself and showed that she did not have knowledge of the movements of the accused. Importantly, DW2 was in fact not listed in the alibi notice of the defence. The calling of DW2 as a witness therefore appears more to be an afterthought.

**[82]** The testimony of the accused's father, Othman bin Mohammad ('DW3') too is not free from problems. Although he confirmed that the

A accused was at home on both days of 4 September and 5 September 2016, when cross examined, DW3 agreed that he would not know where the accused went to before he came back at 2.30am on 5 September 2016, and as to the testimony of the accused that he returned at 2.30am on 5 September 2016, DW3 said everyone was asleep at the time but he did check the rooms at 3am and confirmed the accused was at home.

B

**[83]** It is very clear that the accused himself said that he was not at home at around 1am on 5 September 2016 as he only reached home at 2.30am same day. It is his version that he was with his cousin, Faris Irfan at the latter's house in Kajang until about 11pm on 4 September 2016. He left Kajang and headed to Bangi and then, not long after that, crucially at around 1am on 5 September 2016 (the time and date specified in the charge) the accused said he started driving his way back home.

C

D

**[84]** As such, at the material time, from 11pm to 2.45am the accused was driving from Kajang, then was at Bangi before heading home at Batang Berjuntai. There was no one else with the accused during this period. Yet this is the pertinent period. And this version of the accused is, to start with, even inconsistent with his own alibi notice which stated he was at home for the entire of two days of 4 September and 5 September 2016. The accused also did not call his cousin (Faris Irfan) to confirm his version that he was with his cousin at the latter's residence in Kajang until 11pm on 4 September 2016. In fact the accused too could not definitely state his exact whereabouts at 1am on 5 September 2016. The evidence of DW2 and DW3 too could not positively confirm that the accused was at home at the time of the crime, as discussed earlier.

E

F

**[85]** The evidence of DW4 is not strictly that of an alibi witness because DW4 and the evidence he gave had nothing to do with the time and date as stated in the charge. DW4 only featured in the narrative of the defence on 6 September 2016, the day after the commission of the robbery. DW4 had nothing to show that the accused was not at the place at the time and date as specified in the charge.

G

H

**[86]** It is true that the defence sought to augment the argument that the accused was a mere bystander at the time of the arrest on 7 September 2016. This is where the evidence of DW4 is of relevance. DW4 sought to support the version that the accused was dropped off in the vicinity of the crime scene in the early morning of 7 September 2016 and was mistakenly apprehended by the police in their pursuit of the actual suspects.

I

**[87]** DW4 testified that the accused drove his father's car and met him ('DW4') in the afternoon of 6 September 2016, and they both went to a few

places — first, in Puncak Alam, then, a hospital near Jalan Pudu KL, and after that, Ampang Point — on the pretext of delivering 'medical certificates'. Between 1.30am and 2am on 7 September 2016 the accused and DW4 headed for the *Borneo Entertainment Centre* at Taman Seri Rampai where they befriended Ana. The three of them then made a trip to Kota Damansara and arrived at about 3.30am. After spending some time there they decided to head towards Jalan Kepong to send Ana back at the *Borneo Entertainment Centre*.

**[88]** It was whilst they were on their way that the accused asked to be dropped off at a Petronas petrol station (which happened to be near the crime scene) because he was hungry and wanted to get something to eat. The accused got off at about 4am. As he was approaching a row of shops he saw the police pursuing a few men. He was apprehended shortly thereafter.

**[89]** In my assessment it is pretty plain that the testimony of DW4 is indeed generally in consonance with the version offered by the accused. However on a closer scrutiny of the evidence of the defence witnesses, I cannot but readily agree with the findings of the learned trial judge that this version is a fabrication. For two principal reasons.

**[90]** The first is borne out of the missing person report lodged by the accused's father ('DW3') to the police on 14 September 2016, a few days after the robbery and when the accused was already detained in police custody (for which DW3 had no knowledge of). The report ('D9') did state that the accused left home on 6 September 2016 with DW3's Proton Wira Aeroback but crucially stated that in his efforts to locate the accused, DW3 contacted friends of the accused including DW4, who, according to DW3 in the report had told DW3 that DW4 did not know where the accused was and had not met the accused.

**[91]** It is incredulous for DW4, a close friend of the accused known to DW3 to have failed to mention to DW3, the accused's father (who was searching high and low for his son) that DW4 had met the accused on 6 September 2016 and dropped the accused off at about 4am on 7 September 2016, at the Petronas Jalan Kepong and that DW4 who later returned to the area could not find the accused. When questioned in cross-examination, DW4 unconvincingly explained that he did not mention all this to DW3 because he assumed DW3 knew where the accused was. This is patently absurd as in the first place the reason DW3 contacted DW4 was precisely to find out the whereabouts of the accused.

**[92]** The second reason is not unrelated to the first. As mentioned in his police report, DW3 was also worried about his car which was driven out by the accused on 6 September 2016. According to the defence's narrative, the

rendezvous on 6 September 2016 and 7 September 2016 involving the accused, DW4 and later, Ana, used DW3's car. As according to DW4 the accused got dropped off and not subsequently found by DW4, DW3's car continued to be in the custody of DW4.

**[93]** Yet DW4 failed to mention anything about the car when DW3 contacted him. And neither did he take any steps to return the car to DW3 which could have been easily done since DW4 knew DW3 and where the accused lived. In truth, on the evidence, the movements of the accused on 6 September 2016 and 7 September 2016 as narrated by the accused and DW4 seriously lack credibility. DW4 was never with the accused at the material time. The same applies to the version that they used DW3's car throughout the period. It never happened.

**[94]** It is true that the only evidence which puts the accused at the crime scene at the time of the offence was PW1's oral identification. But this is no bar to a conviction if it credibly and adequately forms part of the evidence that establish a prima facie case and if the accused fails to raise a reasonable doubt.

**[95]** The Federal Court in *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137 observed thus:

> As such it would be wrong that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably the true.
>
> It is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime. The evidence of his alibi need only raise a reasonable doubt that he committed the crime.

**[96]** It is in fact plain from the grounds of the judgment of the trial judge in the instant case that the version narrated by the accused and DW4 was not accepted because it was disbelieved. It was not credible.

**[97]** For completeness I should add that there is no legal presumption that an interested witness should be disbelieved. He is entitled to credence until cogent reason for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (see *Balasingham v Public Prosecutor* [1959] 1 LNS 8*).* And in *Ng Nai Lim v Pendakwa Raya* [2011] MLJU 461; [2011] 1 LNS 487, the court held that since there was an element of bias from the evidence of the witness who testified that he gave evidence in court to help the accused who was his father, the evidence given by the witness should be taken with caution. In the instant appeal before me, the fact that Muhammad Shaqir

('DW4') was a close friend of the accused cannot be said to be entirely irrelevant.

**[98]** I would therefore agree with the learned trial judge's findings which disbelieved the alibi evidence of the accused. There are no reasons for this appellate court to interfere with this finding of fact by the trial court. There were, as discussed, valid grounds for the trial judge to disbelieve the alibi evidence given by the accused and his witnesses.

**[99]** In order to complete this discussion on alibi, it would not be remiss of me to refer to the Federal Court decision in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 where the implications of alibi evidence was succinctly but instructively stated in the following terms:

> [35] As the issue of D428 is relevant to the plea of alibi which was invoked by the first respondent a need arises for us to discuss the concept of alibi first. *Sarkar on Evidence* (15th ed) at p 258 states that the word 'alibi' is of Latin origin and means 'elsewhere'. By claiming he was elsewhere he would thus be physically incapable of committing the offence he is charged with. As mere assertion of alibi is insufficient to exculpate himself he thus must adduce credible evidence that can cast a reasonable doubt over the prosecution's case, evidence that must include particulars of the place where he claimed he was at the time of the commission of the offence.
>
> [36] In Malaysia this plea of alibi, which is more a rule of evidence rather than a defence in the normal sense, together with the burden placed on the person who asserts that he was elsewhere, can be found in the Evidence Act 1950. Section 11 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Under illustration (a), whether A committed a crime on a certain day and the fact that he was somewhere else, is relevant. Therefore if an accused person, in this case the first respondent, states that he was somewhere else ie, he was not at the scene of crime that inconsistent fact is relevant. If successful in establishing his alibi his acquittal should be assured as he could not have committed a crime when he was physically away from the scene of crime.
>
> [37] The burden of proving the commission of an offence by an accused person never shifts away from the prosecution whilst the burden of establishing that defence of alibi lies on the accused person.
>
> [38] Mere service of a notice of alibi on the prosecution is not sufficient to substantiate the truth of such notice even though an accused person does not assume the burden of proving its truth. The burden is still on the prosecution to prove its falsity by evidentially establishing the presence of the accused person of having been at the scene of the crime at the material time. The falsity of that notice will crystallise once the prosecution successfully establishes a prima facie case.
>
> [39] As said above, if the prosecution fails to establish a prima facie case then the need by the accused person to prove his alibi defence does not arise; but once the

prosecution discharges his prosecutorial burden of proof that led to the establishment of the prima facie case, it then becomes incumbent upon the accused person to cast a reasonable doubt that he was elsewhere (*Gurcharan Singh & Anor v State of Punjab* AIR [1956] SC 460; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ (Rep) 101). This is a heavy burden on the first respondent and that burden flows from s 103 of the Evidence Act 1950 (*Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1). Section 103 reads:

> 103 The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ILLUSTRATIONS
>
> (a) ...
>
> (b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

**[100]** In the instant case, the High Court on appeal found that a prima facie case had been established. And during the defence stage, the accused had failed to cast a reasonable doubt that he was elsewhere. There is therefore no merit in this ground of appeal.

**[101]** As such, given the foregoing, I affirm the conviction of the appellant by the sessions court.

APPEAL AGAINST SENTENCE

**[102]** I find no reason to interfere with the sentence meted out by the learned trial judge who had taken into account all relevant considerations.

**[103]** I am in this regard reminded of the decision of Hilbery J for the English Court of Appeal in *R v Kenneth John Ball* 25 Criminal Appeal Reports 64 (also referred to in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256) on the basis for appellate intervention, as follows:

> In the first place, this court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence. the trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles, then this court will intervene.

**[104]** The grounds of the decision of the learned trial judge exhibit that emphasis was correctly given on public interest and the need for a sentence that

reflected the seriousness of the offence and to deter the accused and others from repeating or committing the same in future. As stated by Hashim Yeop Abdullah Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

**[105]** Further, I find that the sentence commensurates with the gravity of the offence and as reflected in the facts of the case. The sentence to must be proportionate to both the gravity of the offence and the degree of responsibility of the accused.

**[106]** In the often quoted decision of the Canadian Supreme Court in *R v Ipeelee* [2012] SCC 13 it was held by Le Bel J instructively as follows:

> Proportionality is the *sine quo non* of a just sentence. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

**[107]** Another case of importance in this context is the Supreme Court decision in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 which ruled in the following clear terms:

> In assessing the length of custodial sentence the court must look at the overall picture in perspective by considering firstly the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

**[108]** In the final analysis a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval vis a vis the offence in question.

**[109]** Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by

the facts of the case must be placed in its proper context and perspective.

**[110]** It is to be observed that the maximum jail term stipulated under s 395 is 20 years. The prosecution thus submitted that the custodial sentence in this case is grossly inadequate as it should be more than half the maximum.

**[111]** It is also noted that there is no submission from the prosecution that the sentence meted out by the learned trial judge, especially on the custodial sentence of seven years is not in consonance with the prevailing trend in sentencing for crimes under s 395 of the Penal Code, given the absence of any reported cases to support such a contention. I also observe from the facts that the robbery did not involve the use of any weapons, which would have been an aggravating factor (see *Pendakwa Raya v Fernando Esteban Candia Olcay & Anor* [2019] MLJU 268; [2019] 7 CLJ 96 and *Lim Kim Seng & Anor v Public Prosecutor* [1992] 1 SLR 743).

**[112]** Having evaluated those considerations, in my view the sentence of seven years' imprisonment and two strokes of whipping ordered by the sessions court is one that reflects the key sentencing objectives of not only prevention and deterrence, but also retribution and reformation (see *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186). The sentence is not grossly inadequate.

**[113]** In my judgment, the sentence constitutes a balanced determination of a proportionate, fair and appropriate punishment for the appellate for having been found guilty of an offence under s 395 of the Penal Code, as charged, considering the facts of the case.

CONCLUSION

**[114]** In view of the myriad of reasons that I have discussed above, I find that there are absolutely no appealable errors that warrant intervention by this court against either the conviction of or the sentence against the accused.

**[115]** I therefore affirmed the decisions of the learned trial judge on both conviction and sentence and dismissed the appeals.

*Appeals dismissed and session court's decision affirmed.*

Reported by Izzat Fauzan